

Counsel listed on signature page

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

BOOKHAM, INC., a Delaware Corporation,

Case No. 5:08-CV-01275-RMW

Plaintiff,

V.

JDS UNIPHASE CORPORATION,
a Delaware Corporation;
AGILITY COMMUNICATIONS, INC.,
a Delaware Corporation; and DOES 1-10,

Defendants.

**JOINT CASE MANAGEMENT
STATEMENT BY BOOKHAM, INC.,
JDS UNIPHASE CORP., AND
AGILITY COMMUNICATIONS, INC.**

Plaintiff Bookham, Inc. (“Bookham”) and Defendants JDS Uniphase Corporation (“JDSU”) and Agility Communications, Inc. (“Agility”) submit this Joint Case Management Statement.

1. Jurisdiction and Service:

The Court has jurisdiction over Bookham's noninfringement, invalidity, and unenforceability claims under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 and 28 U.S.C. § 1338. The Court has jurisdiction over Bookham's remaining claims under 28 U.S.C. § 1367. The Court has jurisdiction over JDSU's infringement counterclaims under 28 U.S.C. § 1338.

1 After Bookham filed its declaratory judgment complaint, the parties attempted to settle
 2 their dispute. Pending the outcome of those discussions, the parties agreed to stand down on
 3 litigation. JDSU and Agility were properly served with process on June 30, 2008. JDSU and
 4 Agility answered Bookham's complaint on July 21, 2008 and asserted counterclaims for
 5 infringement. Bookham will answer JDSU's counterclaims by August 11, 2008.

6 No disputes regarding personal jurisdiction or venue exist at this time.

7 **2. Facts:**

8 The three patents-in-suit are U.S. Patent Nos. 6,658,035 (the " '035 Patent"), 6,654,400
 9 (the " '400 Patent"), and 6,687,278 (the " '278 Patent"). The patents-in-suit relate to tunable laser
 10 technology. All three of the patents have the same filing date, and claim the benefit of the same
 11 three provisional patent applications.

12 Bookham is headquartered in San Jose, California. It designs, manufactures, and sells
 13 tunable laser products for use in optical communication systems.

14 JDSU is headquartered in Milpitas, California. JDSU acquired Agility and the patents-in-
 15 suit in November 2005. Agility was merged into JDSU and no longer exists as a corporate entity.

16 Bookham contends that, in bad faith, JDSU threatened Bookham's customers and
 17 potential customers with infringement liability if they purchased Bookham's products, and that
 18 JDSU continued making threats even after Bookham put JDSU on notice that the patents-in-suit
 19 are invalid and unenforceable. JDSU denies these allegations.

20 Bookham seeks declarations that it does not infringe any valid, enforceable claim of the
 21 patents-in-suit, that the patents-in-suit are invalid and unenforceable, and that, by operation of the
 22 doctrine of infectious unenforceability, all related patents in the same patent family are
 23 unenforceable. Bookham also seeks money damages and injunctive relief for its tortious
 24 interference and unfair competition claims.

25 JDSU asserts that the patents-at-issue are valid and enforceable. JDSU further contends
 26 that Bookham willfully infringed, and continues to willfully infringe, the '035, '278, and '400
 27 Patents. JDSU seeks money damages, enhanced damages, injunctive relief, fees, and costs for
 28 Bookham's alleged infringement.

1 3. **Legal Issues:**

2 The parties dispute at least the following legal issues:

- 3 • Whether Bookham's tunable laser products infringe any valid, enforceable claim of the
4 ‘035, ‘400, or ‘278 Patents.
- 5 • Whether the claims of the ‘035, ‘400, and ‘278 Patents are invalid under 35 U.S.C.
6 §§ 101, 102, 103, 112, or 116.
- 7 • Whether the claims of the ‘035, ‘400, and ‘278 Patents are unenforceable for inequitable
8 conduct, and whether all of the other patents in the same family are unenforceable by
9 operation of the doctrine of infectious unenforceability.
- 10 • Whether Agility owned the patents-in-suit, whether JDSU, as Agility's successor-in-
11 interest, owns the patents-in-suit, and whether subject matter jurisdiction exists for
12 JDSU's infringement counterclaim.
- 13 • Whether, in bad faith, JDSU made allegations regarding Bookham's alleged infringement
14 of the ‘035, ‘278, or ‘400 patents to Bookham's customers and potential customers and, if
15 so, whether those allegations constitute tortious interference with Bookham's prospective
16 economic advantage.
- 17 • Whether, in bad faith, JDSU made allegations regarding Bookham's alleged infringement
18 of the ‘035, ‘278, or ‘400 patents to Bookham's customers and potential customers and, if
19 so, whether JDSU's allegations of patent infringement constitute statutory unfair
20 competition under California Business and Professional Code § 17200.
- 21 • Whether Bookham infringed, and continues to infringe, the patents-in-suit.
- 22 • Whether Bookham's infringement is willful.
- 23 • Whether JDSU is entitled to injunctive relief.
- 24 • Whether JDSU is entitled to compensatory damages, including lost profits, and whether
25 JDSU is entitled to enhanced damages and attorneys fees for Bookham's willful
26 infringement.

27 4. **Motions:**

28 JDSU filed an administrative motion to consider whether this case should be related with

1 *JDS Uniphase v. Syntune, AB and Cyoptics, Inc.*, No. C08-03498, a patent litigation JDSU
 2 commenced on July 21, 2008, in which JDSU asserts that Syntune, AB and Cyoptics, Inc.
 3 infringe the '035, '278, and '400 Patents. The case is pending before this Court.

4 Bookham plans to file petitions for reexamination of the patents-in-suit within 30 days,
 5 and will seek to stay this litigation pending the outcome of the reexamination proceedings. JDSU
 6 plans to oppose any motion to stay this litigation.

7 JDSU plans to file a motion to consolidate this case with *JDS Uniphase v. Syntune, AB*
 8 and *Cyoptics, Inc.*, No. C08-03498, for purposes of claim construction, discovery, and trial.
 9 Bookham believes a motion to consolidate is premature at this juncture.

10 **5. Amendment of Pleadings:**

11 Bookham filed a First Amended Complaint on June 30, 2008.

12 The parties propose a November 14, 2008, deadline for amending pleadings.

13 **6. Evidence Preservation:**

14 Bookham instituted a document preservation plan shortly after receiving JDSU's
 15 infringement notice letter. Bookham has taken steps to preserve evidence that may be relevant to
 16 this action.

17 JDSU instituted a document preservation plan immediately after the commencement of
 18 litigation. JDSU has taken steps to preserve evidence that may be relevant to this action.

19 **7. Disclosures:**

20 The parties plan to serve initial disclosures on or before August 6, 2008.

21 **8. Discovery:**

22 The parties propose the following modifications to the discovery rules:

- 23 • Each side may take up to 70 hours of party depositions, including 30(b)(6) and 30(a)(1)
 24 depositions. Subject to the aforementioned time limit, the 30(b)(6) deposition of a party
 25 may be noticed more than once, and 30(b)(6) deposition time may extend for more than
 26 seven hours.
- 27 • To the extent foreign language depositions are required, two-thirds of the total deposition
 28 time will be counted toward a party's time limit if a translator is used; check translators

1 are allowed, and disputes regarding translation can be stated on the record by the check
 2 translator.

3 • Each side may serve up to two depositions on written questions to custodians of business
 4 records for opposing parties; each such deposition on written questions shall be limited to
 5 no more than 20 questions.

6 • The parties may serve an unlimited amount of depositions on written questions to non-
 7 party custodians of business records for the purposes of authenticating documents.

8 • The parties may serve an unlimited number of document subpoenas to third-parties.

9 **9. Related Cases:**

10 On July 21, 2008, JDSU filed a suit, *JDS Uniphase v. Syntune, AB and Cyoptics, Inc.*, No.
 11 C08-03498, in which it asserted claims alleging infringement of the same patents that are the
 12 focus of this litigation.

13 **10. Relief:**

14 **Bookham seeks the following relief:**

15 • Declarations of non-infringement of the '035, '400, and '278 Patents under the
 16 Declaratory Judgment Act.

17 • Declarations of invalidity of all claims of the '035, '400, and '278 Patents under the
 18 Declaratory Judgment Act.

19 • Declarations of unenforceability of all claims of the '035, '400, and '278 Patents under the
 20 Declaratory Judgment Act, and declarations of unenforceability of all other United States
 21 patents in the same family pursuant to the doctrine of infectious unenforceability.

22 • An injunction against JDSU and Agility preventing them from making assertions to
 23 Bookham or to third parties that Bookham's tunable laser products infringe any claims of
 24 the patents-in-suit.

25 • Bookham's lost profits arising from JDSU and Agility's tortious interference with
 26 Bookham's prospective economic advantage.

27 • Restitution damages from JDSU and Agility for the harm their unfair competition has
 28 caused Bookham.

- 1 • An injunction against JDSU and Agility preventing them from future unfair competition
2 with Bookham.
- 3 • Punitive damages from JDSU and Agility.
- 4 • Bookham's attorney fees and costs pursuant to 35 U.S.C. § 285.

5 **JDSU seeks the following relief:**

- 6 • A finding that Bookham has infringed, and continues to infringe, the claims of the '035,
7 '278, and '400 Patents, and that such infringement was willful.
- 8 • An award of compensatory damages resulting from Bookham's infringement, including in
9 the form of lost profits, plus interest.
- 10 • An award of treble damages and attorney fees for willful infringement.
- 11 • An injunction against Bookham, its employees, and agents against future infringement of
12 the claims of the '035, '278, and '400 Patents.

13 **11. Settlement and ADR:**

14 The parties engaged in settlement discussions between March and June, 2008, and were
15 unable to reach a settlement. At present, no settlement negotiations are occurring. A claim
16 construction order and/or rulings on dispositive motions may facilitate the resumption of
17 settlement negotiations. The parties have discussed the possibility of mediation and may consider
18 retaining a private mediator at some point in the future. JDSU proposes that the parties engage in
19 binding arbitration. Bookham refuses to engage in binding arbitration.

20 **12. Consent to Magistrate Judge For All Purposes:**

21 Bookham declined magistrate jurisdiction on April 14, 2008.

22 **13. Other References:**

23 The parties do not believe that the litigation is suitable for reference to a special master or
24 the Judicial Panel on Multidistrict Litigation. As stated above, JDSU would prefer to engage in
25 early binding arbitration through a private arbitrator, whereas Bookham does not believe that the
26 litigation is suitable for binding arbitration.

27 **14. Narrowing of Issues:**

28 1. Oral and written communications between an expert witness for any party and the

party, its attorneys, or representatives employing the expert that are made in connection with the expert witness's engagement are not discoverable except to the extent that the expert relied on them as a basis for his opinions.

2. Drafts of a report of an expert witness that are prepared in connection with the subject matter of this litigation are not discoverable.

15. Expedited Schedule:

No special process is requested.

16. Scheduling:

The parties propose the following dates:

Event	Date
Rule 26 Initial Disclosures	August 6, 2008
Patent L.R. 3-1 and 3-2 disclosures	August 18, 2008
Patent L.R. 3-3 and 3-4 disclosures	October 2, 2008
Patent L.R. 4-1 disclosures	October 13, 2008
Patent L.R. 4-2 disclosures	November 3, 2008
Joint claim construction and prehearing statement (Patent L.R. 4-3)	December 1, 2008
Completion of claim construction discovery (Patent L.R. 4-4)	January 5, 2009
Opening claim construction briefs (Patent L.R. 4-5)	January 15, 2009
Claim construction opposition briefs (Patent L.R. 4-5(b))	January 29, 2009
Claim construction reply briefs (Patent L.R. 4-5(c))	February 5, 2009
Claim construction hearing (Patent L.R. 4-6)	Per Court schedule
Further case management conference	Following Claim Construction Hearing
Parties serve opening expert reports	60 days after Claim Construction Order

1	Parties serve rebuttal expert reports	90 days after Claim Construction Order
2	Factual discovery closes	120 days after Claim Construction Order
3	Expert discovery closes	120 days after Claim Construction Order
4	Dispositive motion deadline	150 days after Claim Construction Order
5	Motions <i>in limine</i> and <i>Daubert</i> motions	TBD
6	Pre-trial disclosures and proposed jury instructions	TBD
7	Pre-trial conference	TBD
8	Jury trial begins	TBD
9	Bench trial on inequitable conduct begins	TBD

12
13. **Trial:**

14. Bookham and JDSU have both requested a jury trial on all issues that are triable to a jury.

15. **Disclosure of Non-Party Interested Entities or Persons:**

16. Bookham filed a corporate disclosure statement pursuant to Civil Local Rule 3-16 on
17. June 30, 2008. Bookham is unaware of any non-party that possesses a financial interest in the
18. subject matter in controversy or any other kind of interest that could be substantially affected by
19. the outcome of the proceeding.

20. JDSU filed a corporate disclosure statement pursuant to Civil Local Rule 3-16 on June 30,
21. 2008. JDSU is unaware of any non-party that possesses a financial interest in the subject matter
22. in controversy or any other kind of interest that could be substantially affected by the outcome of
23. the proceeding.

24.
25. Dated: August 1, 2008
26.
27.
28.

1 COOLEY GODWARD KRONISH LLP

2 FAEGRE & BENSON LLP

3 /s/ Orion Armon
4 Orion Armon (*pro hac vice*)5 COOLEY GODWARD KRONISH, LLP
6 THOMAS J. FRIEL, JR. (80065)
7 tfriel@cooley.com
8 JEFFREY S. KARR (186372)
9 jkarr@cooley.com
3000 El Camino Real
Five Palo Alto Square
Palo Alto, CA 94306
Telephone: (650) 843-5000
Facsimile: (650) 857-066310 COOLEY GODWARD KRONISH, LLP
11 WAYNE O. STACY (*pro hac vice*)
12 wstacy@cooley.com
13 ORION ARMON (*pro hac vice*)
14 oarmon@cooley.com
380 Interlocken Crescent, Suite 900
Broomfield, CO 80021-8023
Telephone: (720) 566-4000
Facsimile: (720) 566-409918 Attorneys for Plaintiff
19 BOOKHAM, INC., a Delaware Corporation3 /s/ Mary v. Sooter
4 Mary v. Sooter (*pro hac vice*)5 NATALIE HANLON-LEH (*pro hac vice*)
6 nhanlon-leh@faegre.com
7 MARY V. SOOTER (*pro hac vice*)
8 msooter@faegre.com
9 DAVID J.F. GROSS (*pro hac vice*)
dgross@faegre.com
10 TIMOTHY E. GRIMSRUD (*pro hac vice*)
11 tgrimsrud@faegre.com
12 FAEGRE & BENSON LLP
13 3200 Wells Fargo Center
14 1700 Lincoln Street
Denver, Colorado 80203
Telephone: 303-607-3500
Facsimile: 303-607-360015
16
17
18 HEATHER N. MEWES (CSB No. 203690)
19 hmewes@fenwick.com
20 LAUREN E. WHITTEMORE (CSB No.
21 255432)
22 lwhittemore@fenwick.com
23 FENWICK & WEST LLP
24 555 California Street, 12th Floor
25 San Francisco, California 94104
26 Telephone: 415-875-2300
27 Facsimile: 415-281.135028 Attorneys for Defendants
JDS UNIPHASE CORPORATION and
AGILITY COMMUNICATIONS, INC.

20 305837 v2/CO